

**BEFORE THE
NATURAL RESOURCES COMMISSION
OF THE
STATE OF INDIANA**

IN THE MATTER OF:

RECODIFICATION OF)	Administrative Cause
ENTOMOLOGY & PLANT)	Number: 08-005E
PATHOLOGY (312 IAC 18))	(LSA Document #08-76(F))

RECOMMENDATION FOR FINAL ACTION ON READOPTION OF RULE

A. INTRODUCTION

For consideration is the final adoption of the recodification of the Entomology and Plant Pathology rule article (312 IAC 18). This article includes 312 IAC 18-1 (Definitions); 312 IAC 18-2 (Infested Areas and Quarantines); 312 IAC 18-3 (Control of Pests or Pathogens); 312 IAC 18-4 (Nurseries, Nursery Stock, Nurserymen, Dealers and Agents); 312 IAC 18-5 (Special Service Fees); and 312 IAC 18-6 (Trade Secrets). The text of 312 IAC 18 can be accessed through the Legislative Services Agency website at:

<http://www.in.gov/legislative/iac/T03120/A00180.PDF>.

In April 2002, the Natural Resources Commission approved delegations of authority with respect to recodifications. Where the rules are being readopted in their current form without amendments the Director of the Division of Hearings may approve preliminary action. However, the Commission retained authority to take final action on recodifications.

The Entomology and Plant Pathology rules are proposed for readoption without amendment and the Director of the Division of Hearings approved preliminary action. It is the standard practice to readopt rules by article and 312 IAC 18 is now submitted for consideration as to final action.

B. RECODIFICATION ANALYSES UNDER IC 4-22-2-3.1

In August 2008, Megan Abraham, South Region Supervisor, acting under the authority of Phillip T. Marshall, Director of the Department of Natural Resources Division of Entomology and Plant Pathology, who was identified as the Small Business Regulatory Coordinator, provided the following analyses of potential impacts to small business for the proposed readoption of 312 IAC 18:

READOPTON OF RULES: SMALL BUSINESS ANALYSIS

312 IAC 18 Entomology and Plant Pathology

(LSA Document #08-76; Administrative Cause No. 08-005E)

The continued need for the rule.

312 IAC 18-1

This rule provides the definitions needed to implement the rules in 312 IAC 18. Thus, this rule is needed to follow IC 14-24 and to support the work and requirements in 312 IAC 18 which is the article that supports the agriculture, horticulture, and silviculture industries' ability to provide pest and pathogen free products. All businesses subject to Article 18 will be subject to the rule. The businesses are not subjected negatively or positively by the rule.

312 IAC 18-2

312-IAC 18-2 establishes the procedures to declare an infested area and to create, issue, and terminate a quarantine under IC-24-14-3 and IC 24-14-4. Thus, this rule serves as the foundation for the prevention, management and eradication of pests or pathogens that impact the plant and bee industries in Indiana. This rule allows for and supports quarantines for larger pine shoot beetle (312 IAC 18-3-12), gypsy moth (312 IAC 18-3-14), and emerald ash borer (312 IAC 18-3-18) in the State of Indiana. This rule also provides right of entry for staff in the Division of Entomology and Plant Pathology for survey purposes. The rule will continue to be used and is needed to create quarantines for other pests or pathogens that infest and threaten the horticultural, agricultural, apicultural, silvicultural and other natural resources of Indiana. International and national trade moves pests and pathogens quickly and unintentionally into new areas. For this reason, this rule is needed to manage potential pests and pathogens as many are major threats to our natural resources and plant industry.

312 IAC 18-3

There is a continued need for 312 IAC 18-3 as this rule identifies current pests or pathogens and establishes standards for the control of these pests within the State of Indiana. This rule allows the Division of Entomology and Plant Pathology (DEPP) to restrict movement of regulated materials within the state thereby reducing the spread rate of these pests and decreasing the potential damage to industry and natural resources. This rule identifies regulated articles for each of the invasive species in Indiana and documents regulatory control measures and restrictions placed on these

articles. The rule will continue to be used by the DEPP, industry in Indiana as well as the public to determine what steps need to be taken to decrease the likelihood of inadvertently or artificially spreading these pests and pathogens.

312 IAC 18-4

312 IAC 18-4 provides for the regulation of nurseries, nursery dealers, and agents. It also ensures that nurseries are inspected regularly by the DEPP. These routine inspections allow the DEPP to certify that the plants in Indiana's nurseries are free of pests and pathogens. The cultivation of "pest and pathogen" free nursery stock allows the nurseries and nursery dealers to sell and move plants intrastate and interstate. The required licensing and certification imposed by the rule as well as the associated costs are necessary to maintain the quality of Indiana's horticultural industry. The spread of insect and disease pests can have a major economic impact on the State's horticultural and agricultural industries as well as the State's natural resources. This rule is needed to allow trade in the horticultural industry. The rule assists the horticultural industry to grow and sell healthy plants.

312 IAC 18-5

Rule 312 IAC 18-5 "Special Services Fees" establishes fees for special services provided by the DEPP. The fees are deposited in the DEPP fund to support the division for services rendered. These services include voluntary certification for florists or greenhouses, laboratory work requested by the public, phytosanitary documents, and certification of herbaceous perennials transported to another state.

The special service fees are necessary to maintain the quality of Indiana's horticultural industry. The services provided by the DEPP aid in the prevention of the spread of pests and pathogens. The spread of pests and pathogens has significant economic impacts on the State's horticultural and agricultural industries as well as the State's natural resources. The phytosanitary documents allow vendors in Indiana to transport or sell plant material to other states as well as internationally. Without the phytosanitary documents, these vendors would incur trade restrictions which would be monetarily detrimental to their business as they would not be able to sell product to customers outside of Indiana.

312 IAC 18-6

312-IAC 18-6 protects the intellectual and technical knowledge of a business that may be contained in any permits and/or documents submitted to comply with requirements of 312 IAC 18. This ensures that vendors can submit the information needed to meet the requirements to issue a permit or certification and remain protected. This rule assists in the maintenance of business and commerce associated with the businesses impacted by 312 IAC 18. This rule is needed to comply with IC 14-24-3 and aid agricultural, horticultural and other plant industry businesses in the protection of their intellectual property.

The nature of any complaints or comments received from the public, including small businesses, concerning the rule or the rule's implementation by the agency.

312 IAC 18-1

There have been no complaints or comments received from the public concerning Rule 1 Definitions.

312 IAC 18-2

Complaints and comments relate to the understanding of the requirements of a quarantine where applied by this rule. The comments and complaints usually involve the restrictions placed on small businesses in moving regulated materials from quarantined areas to non-quarantined areas. In other cases, the mandatory destruction of certain materials in order to enforce the quarantine can cause loss of revenue. However, the destruction of ash trees under the emerald ash borer quarantine and eradication project only resulted in a minimal number of complaints and was accepted by the public and small businesses.

312 IAC 18-3

Complaints and comments relate to the understanding of the requirements or restrictions where applied by this rule. The comments and complaints usually involve the restrictions placed on small businesses in moving regulated materials from quarantined areas to non-quarantined areas. In other cases, the mandatory destruction of certain materials in order to enforce quarantines and prevent spread, creates comments and complaints related to loss of revenue.

Positive comments are also received from the public in relation to the rule. Public education and outreach regarding the rule lead to understanding by the public of why these measures are enacted and the outcomes associated with reducing the spread of invasive species in Indiana. This leads the public to be appreciative and supportive of the measures that DEPP takes in reducing the spread of these pests and pathogens.

312 IAC 18-4

Several nurseries and greenhouses have stated their appreciation for the services provided by the DEPP. Without these routine inspections many small businesses would not be allowed to sell their product to other states. Other states have rules that require plants to be pest and pathogen free if sold or brought into their state. The inspections also bring potential pest and pathogen problems that might have been previously overlooked to the attention of the nursery owner. The DEPP is then able to educate the grower on methods to control the pest or pathogen in question. Occasionally, some small businesses owners are not appreciative of the services provided by the DEPP. These clients are disapproving of government oversight into their operations and look upon these inspections as a burden.

312 IAC 18-5

Businesses in Indiana appreciate the rule and its existence as they are able to certify their plant materials pest and pathogen free. This allows them to broaden their customer base to an international market as long as they meet the requirements of the country or state to which they are shipping. The Memorandum of Understanding

with the USDA/APHIS that allows DEPP to provide Indiana businesses with federal phytosanitary certificates reduces the potential lag time in which a business would have to wait to get an inspection completed by USDA/ APHIS.

Complaints from the public in reference to the rule concern the differences in the federal phytosanitary request system between the State of Indiana and the USDA/APHIS. The DEPP is currently working with the USDA/ APHIS to begin the process of utilizing the Phytosanitary Certificate Issuance and Tracking (PCIT) system which is an online system that will allow vendors to submit phytosanitary certificate requests through the federal program that the DEPP will be able to access and complete, creating less confusion for Indiana's vendors.

312 IAC 18-6

There have been no complaints or comments received from the public or small businesses in reference to this rule. Though this rule is enacted occasionally it is not utilized on a regular basis. Small businesses have asked questions and asked for clarification regarding the rule's ability to protect confidential business information provided in permit and certification applications.

The complexity of the rule, including any difficulties encountered by:

(A) the agency in administering the rule; or

(B) small businesses in complying with the rule.

312 IAC 18-1

The definitions in this rule are stated well and not complex. The agency has no difficulty in administering the rule and small businesses have no difficulty complying with the rule.

312 IAC 18-2

312 IAC 18-2, by itself, is not complex or convoluted. The creation of a quarantine and associated compliance requirements may become complex. Administering and complying with the rule may be difficult for small businesses, the public, and the Division of Entomology and Plant Pathology. This difficulty is the result of defining an infested area as a township. This creates a problem for small businesses to comply with a quarantine because the boundary of a township is not easy to identify. The rules of the quarantine can be complex at first for the public and small businesses to understand. However, information and education programs help overcome the complexity, and placing businesses under compliance agreements helps businesses understand the quarantine.

312 IAC 18-3

Administering and complying with the rule may be difficult for small businesses, the public, and the DEPP. The largest problem the public has in complying with the rule stems from the lack of knowledge that the rule and its stipulations exist. However, information and education programs help overcome the complexity, and placing

businesses under compliance agreements helps businesses understand a quarantine and the requirements of the rule.

312 IAC 18-4

This is not a complex rule. In the past few years the agency has worked with the Indiana Professional Licensing Agency to input the nursery, greenhouse and dealer certifications and licenses into a computer system. This new system allows all of the information on the nurseries in Indiana, as well as the status of fees collected, to be centralized and easily accessible to staff. The only difficulty small businesses have in complying with the rule is that many of the new nurseries and nursery dealers are unaware of the rule. There are many small nursery dealers in the State of Indiana that are operating without a nursery dealer's license because they do not realize that this rule exists. Once notified of the rule and the requirements of that rule they usually comply and continue to renew the license each subsequent year. Unfortunately the DEPP does not have the staff or the resources to locate each nursery dealer in the State of Indiana and is forced to rely on nursery growers insisting that nursery dealers are licensed before they purchase materials from the grower. Other parts of this rule, namely the proper maintenance of a nursery and the correct labeling of nursery stock are not complied with because businesses are unaware of these requirements. The DEPP continues to educate these vendors as time and resources allow.

312 IAC 18-5

This is not a complex rule and the DEPP does not have difficulty in administering the rule. The only difficulty the public has in complying with the rule is that they are sometimes unaware that this and other rules exist. The average person is not aware that a phytosanitary certificate is needed to transport plant materials outside of the State of Indiana, especially plant materials that may harbor plant pests and pathogens that are not already native to the destination state or country. The DEPP continues to conduct public awareness activities through outreach activities and educational campaigns.

312 IAC 18-6

312-IAC 18-6 is not complex or convoluted and no difficulties have been encountered by the Division of Entomology and Plant Pathology or a small business.

The extent to which the rule overlaps, duplicates, or conflicts with other federal, state, or local laws, rules, regulations, or ordinances.

312 IAC 18-1

There is no overlap, duplication, or conflict with other state or local laws, regulations or ordinances. The rule compliments definitions in similar federal laws and does not provide conflicts in applying the rule.

312 IAC 18-2

This rule complements and works with federal quarantine rules and the Plant Protection Act of 2000. The rule does not overlap, duplicate or conflict with other state or local laws or rules.

312 IAC 18-3

This rule complements and works with federal quarantine rules and the Plant Protection Act of 2000. The rule does not overlap, duplicate or conflict with other state or local laws or rules.

312 IAC 18-4

This rule does not overlap, duplicate or conflict with other laws, rules or regulations. Without this rule in place, several vendors in Indiana would not be able to transport their product across state lines. The nursery inspections ensure that the materials do not harbor plant pests or pathogens and therefore are able to be moved to other states and in some cases other countries.

312 IAC 18-5

This rule does not conflict with federal, state or local rules and regulations. Through a Memorandum of Understanding the DEPP is able to assist the USDA/APHIS with the issuance of federal phytosanitary certificates for businesses in Indiana. This allows small businesses in Indiana to sell stock to customers in other countries without relying solely on the USDA/APHIS. The federal phytosanitary program does differ from the DEPP in the cost of the certificates as well as the way in which phytosanitary certificates are requested.

312 IAC 18-6

This rule complements and works with IC 5-14-3 Access to Public Records. This rule also complements federal rules and regulations regarding confidential business information.

The length of time since the rule was last reviewed under this section or otherwise evaluated by the agency, and the degree to which technology, economic conditions, or other factors have changed in the area affected by the rule since that time.

312 IAC 18-1

The rule was last reviewed in 2002. There have been no changes in technology, economic conditions or other factors which would apply to this rule. Nor have there been any changes that would warrant a revision to the rule.

312 IAC 18-2

The rule was reviewed and readopted in 2002. There are no changes in technology that would impact the rule. Economic conditions and other factors have impacted the rule through international trade. These changes include the artificial movement of pests and pathogens which has increased in number and occurrences. When last adopted the rule was primarily concerned with two quarantines, the gypsy moth and pine shoot beetle. Currently Indiana is faced with multiple exotic pests that may

require the use of this rule via quarantine if they are introduced and detected in Indiana.

312 IAC 18-3

The majority of the rule was reviewed and readopted in 2002. Other subsections of the rule including 312 IAC 18-3-12 through 18-3-21 have been readopted and adjusted in the recent years. These sections are currently and frequently under review. Modification to the current rule occurs as the pest or pathogen spreads naturally or artificially. There are no changes in technology that would impact the rule. Economic conditions and other factors have impacted the rule through international trade. These changes include the artificial movement of pests and pathogens included in the rule which have increased in number and occurrences. This has also required the addition of new sections to the rule to address new pests or pathogens such as 312 IAC 18-3-20 regulation of Brazilian elodea and 312 IAC 18-3-21 control of hydrilla.

312 IAC 18-4

October 2002 was the last time that this rule was reviewed. The only subsection of this rule that is currently under review for modification is section 312 IAC 18-4-4 “Certification of strawberry plants; special requirements”. The DEPP is collecting information to determine if the subsection should be modified to account for the natural progression of the pests and pathogens that are mentioned in the rule. The reduction of businesses that are currently growing strawberry in the State of Indiana will also play a role in determining if this rule should be modified. At this time, this subsection should continue to remain in the current rule. The rest of the rule is not subject to change as there have been no changes in technology or economic conditions that would merit revision.

312 IAC 18-5

The last time this rule was reviewed was in October 2002. There have been advances in technology since the last review period in the means of requesting and issuing phytosanitary certificates. Currently the DEPP is working with the USDA/APHIS to begin the process of utilizing the PCIT online phytosanitary certificate request system. However, this rule does not set guidelines for submission of phytosanitary certificate requests by the public, therefore it is unlikely that the rule will need to be modified for the use of PCIT after the program is initiated within the DEPP.

The DEPP is monitoring the amount man hours devoted to inspections of plant materials to determine whether current fees are sufficient to support expenses associated with issuing a phytosanitary certificate. The current DEPP phytosanitary certificate fee is fifty dollars (\$50) for a state or federal phytosanitary certificate. The current USDA/APHIS fee for a federal phytosanitary certificate is \$65 and is projected to increase to \$116 in the next few years. The USDA/APHIS has also proposed that it will begin charging a \$16 processing fee for any federal phytosanitary certificate that is issued by either the DEPP or the USDA in the near

future. At this time, these changes in technology, economic conditions and other factors do not warrant a need to amend the current rule.

312 IAC 18-6

The rule was reviewed and readopted in 2002 and there are no changes in technology, economic conditions or other factors that would impact the rule.

MOST RECENT SMALL BUSINESS IMPACT ANALYSES

Any regulatory alternatives included in the statement under IC 4-22-2.1-5(a)(5)

Regulatory alternatives in the economic impact statements of rules 312 IAC 18-3-12, 18-3-20, 18-3-21 have been reviewed and alternatives to the current rule are not practical. Without rule 312 IAC 18-3-12 “control of larger pine shoot beetles”, the USDA/APHIS would quarantine the entire state of Indiana for the pine shoot beetle thereby restricting movement of pine logs and lumber to other states. This would impose requirements and costs on the small businesses in the twenty-five (25) counties of Indiana that are not currently infested with the pine shoot beetle and are not currently subject to a Federal or State quarantine.

Without rule 312 IAC 18-3-20 “regulation of Brazilian elodea, a pest or pathogen”, the DNR would not be able to restrict the movement of this pest. The minimal costs to small businesses and industry are far outweighed by the cost of eradication when this pest is inadvertently or artificially spread to a new area. Regulatory alternatives in reference to this pest are not effective as accidental spread of the pest by the public is probable.

Without rule 312 IAC 18-3-21 “control of hydrilla”, the DNR would not be able to demand the eradication of hydrilla or to prevent the possession or movement of hydrilla, and the plant will spread quickly to public and private waters. Hydrilla, known as the “world’s worst weed,” would negatively impact aquatic ecosystems, reduce recreational potential on these waters, and negatively impact real estate values around an infested body of water.

(2) Any regulatory alternatives not considered by the agency at the time the statement was prepared could be implemented to replace one (1) or more of the rule's existing requirements.

The three rules in question have been under review in recent years. Fiscal analyses have been completed in this time and regulatory alternatives that are available have been included in the analyses. At this time there are no viable regulatory alternatives that would control these pests as well as the rules that are currently in place.

C. NOTICE OF INTENT TO READOPT AND RECOMMENDATION FOR FINAL ACTION

A “Notice of Intent to Readopt” was posted to the INDIANA REGISTER database website as 20080220-IR 312080076RNA on February 20, 2008 as anticipated by IC 4-22-2.5-2 and

AGENDA ITEM #24

IC 4-22-2.5-4. The notice indicated the intention to readopt the entirety of 312 IAC 18 without changes. The notice provided that a person had 30 days to submit a written request to the Natural Resources Commission seeking to have a particular section of the rule readopted separately. If such a request had been made, the Commission would have been required to complete the full rule adoption process for the section requested to be readopted separately. In this instance, no written request has been received, in which case the Commission may either submit the rule for filing with the publisher under IC 4-22-2-35 or elect the procedure for readoption under IC 4-22-2. The recommendation is that the Commission approval submittal of the rule for filing with the publisher.

Dated: August 20, 2008

Sandra L. Jensen
Hearing Officer